No. 12,547

IN THE

United States Court of Appeals

For the Ninth Circuit

ADOLPH J. SCHNEE,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),

Appellee.

Appellee's Answering Brief

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STATEMENT OF THE CASE

Appellant's statement on page 2 through the first paragraph on page 7, Brief for Appellant, outlines accurately the basis of the action below, the applicable statutes and the trial procedure.

The summary of the evidence on pages 8 through 14 of the Brief places emphasis on certain portions of the testimony and omits entirely other portions, apparently on the theory that the court need only be presented with "the evidence and reasonable inference which tend to support" appellant's case.

For example, appellant stresses (Page 13, Brief) the fact that ballast was lower at the scene of the accident than other ballast (citing T. 339-40)—for the purpose of combining this "slanted" version of the evidence with other evidence to raise an inference that surveyors had been at work at the scene of the accident placing surveyors stakes *to level the ballast.* The testimony actually was that at the point where the white pine stake was driven into the side of the railroad tie the ballast had been dented or "crushed down a bit" apparently by the stick when it plunged into the tie. This is vastly different from some widespread "low spot" in the ballast which might need correction by survey parties and section gangs.

Again appellant makes it appear that survey parties festoon the right of way with grade stakes so that the Southern Pacific main transcontinental track resembles a hedgehog bristling with white pine stakes—by use of a question on cross examination answered by a simple "Yes" (T. 171, 192), appellant likewise by distortion of the testimony makes it appear that the defendant's section foreman was charged with a duty of doing nothing but patrolling the track for surveyor's stakes and metal brakehangers (T. 169, 172). Actually, the foreman was engaged in track patrol in which, among other things, he was to keep the track clear of *obstacles.*

Appellant wholly omits reference to the clear and illustrative photographs of the scene of the accident and of the motor car, which speak more eloquently of actual conditions and what happened, than isolated fragments of "slanted" statement.

Appellant also wholly omits the compelling statements made by plaintiff himself when the accident was fresh in

his mind, (Exhibits F, G and H), and ignores the plaintiff's blanket repudiation at the trial of all three statements, taken at different times by different people, although admittedly over plaintiff's signature (T. 397), a fact plaintiff could not well deny in view of a comparison of signatures (T. 404).

The following statement of the evidence gives a more accurate picture of the evidence.

The plaintiff had been busy, starting at eight o'clock in the morning of August 29, 1946, about his duties as a signalman for the Southern Pacific Railroad on the main transcontinental Southern Pacific railroad track adjacent to Willcox, Arizona (T. 52, 55). After his lunch at 1:00 o'clock in the afternoon the plaintiff took his motor car, placed it on the main line tracks and proceeded east at about seventeen miles per hour to a signal apparatus about two and one-half miles east of Willcox, Arizona (T. 57-9). He examined the signal apparatus and, finding that he needed materials to complete his work (T. 60-63), he thereupon returned to Willcox at the same speed, over the same route, obtained the materials (T. 64-66), and, on his way back, at a point approximately two miles east of Willcox, his motor car gave a vaulting movement (T. 70-71), veering north off the rails onto the ties, until it finally left the track entirely, throwing the plaintiff onto the track and injuring him (T. 85-6, 96, 116, 328-9).

The motor car furnished to the plaintiff and kept by him at Willcox was in very good condition (T. 130) and had been used by plaintiff and his predecessor for several thousand miles (T. 139, 224), being a standard railroad motor car of the type used by signalman generally (T. 53-4 and Photographs D 1-4).

In the morning of the accident, the roadmaster and the assistant division engineer had made a routine inspection trip from Bowie to Willcox and Cochise, covering the place of the accident-to-be, looking at the track and the roadway for the purpose of finding obstructions or defects or conditions in the track which might need attention, but found none at this place (T. 186-189, 191-2, 323). The plaintiff himself as he went over the track was under a duty, in accordance with the rules, to watch the track (T. 228-9), and he *did* watch to make sure "that the track was clear" (T. 69). The signal maintainer and engineer, in their inspection, did not see any survey parties on or near the track (T. 196, 343), although they did see one or two work parties somewhere between Bowie and Willcox (T. 196-7) (twenty-four miles by the map).

The roadmaster and engineer went over the particular place where the accident was to occur, westbound, between ten and eleven A. M. of the morning of the accident (T. 186, 189, 191, 323) and again eastbound between twelve-thirty and one P. M. (T. 191). They were driving their motor car at a speed of between six and fifteen miles an hour (T. 337), making a thorough inspection as they went (T. 187, 191, 323, 337).

The City Marshall of Willcox, and his friend, a mining man, who first went to the scene of the accident, described the marks made by the motor car on the ties as it went along derailed for a considerable distance (T. 86, 115-6), and found near the place where the marks started, a wooden stick, approximately eighteen inches long, an inch and a quarter square (T. 90, 108), which had one end broken off and splintered and the other end burred as if hit by some

heavy object (T. 90, 117). There was oil or grease on this stake (T. 91), but the stick was unpainted (T. 91) and made of white pine (T. 108). They found splinters for four ties from the place where the motor car left the rails (T. 90). They also looked under the motor car, which was then alongside the track, and saw marks and splinters under the car on the underside of the car flooring (T. 103, 113, 115-6) "where something had struck it apparently and had lifted the car" (T. 116). They also found an abrasion on a crosstie in the track, just off center of the track, at a place three or four ties before the derail marks started (T. 115, 117).

Railroad employees later went to the scene of the accident, found the stick described by the City Marshall (T. 142-3, 356) and found the abrasion on the track (T. 325-7, 351). This abrasion was described as a hole about an inch and a half in diameter (T. 330, Photograph C 4, 5), three or four inches below the top of the tie (T. 329, 351), and going into the tie about half an inch (T. 329) at an angle of approximately forty-five degrees (T. 329, 351). The hole was filled tightly with wood fibers which ran lengthwise into the hole, whereas the crosstie fibers ran diagonally across the grain (T. 352). The wood stick bore markings of some caustic material "all around" for about twelve inches along its length (T. 143, 150, 154, 198, 358).

The duties of the plaintiff as signalman included the building of batteries for signals on the railroad (T. 120, 130, 219, 224). Plaintiff had spent a very busy week rebuilding batteries before the accident (T. 224). This process involved the filling of glass jars, fourteen inches deep, with water and with a unit of metal plates and stirring into the water cubes of caustic soda (T. 149, 220). This operation

was ordinarily performed by stirring the water, when the cubes had been placed in it, with a wooden paddle (T. 149, 221).

A more thorough examination of the motor car after the accident showed a broken wedge of wood similar to that in the white pine stick between the floor of the car and the brake rod, at a point some seven-eighths inch extending up to the floor of the car (T. 355, 357, 363-5, Photographs C 1, C 2). Immediately in front of the brake rod is an angle iron extending down two and one-half inches in front of the brake rod and being three and one-half inches in front of the brake rod (T. 364). There was a clearance between the floor of the car and the top of the rails of between fifteen and sixteen inches (T. 365). The wedge found under the motor car was approximately fourteen to sixteen inches in from the side of the motor car (T. 365), and the hole in the tie was found at a point fourteen to sixteen inches from the north rail (T. 352). The stake showed a grease mark at the end where the fibers were broken off, apparently from grease on the brake rod (T. 357). Many pictures were taken of the place of the accident and of the motor car itself and of the wedging of the wood under the motor car (C 1-2, J, K, L, D 1-4).

The plaintiff admitted that his signature appeared on a signed statement taken after the accident by the railroad investigator (T. 397). This statement was taken in the presence of the supervising registered nurse, with permission of the doctor (T. 282, 306), who testified that plaintiff was competent at the time (T. 294, 297-8, 303) under strenuous cross-examination finally terminated by the Judge after excessive badgering of the witness (T. 134). In this signed

statement plaintiff admitted that he had been using a grade stake two and one-fourth feet long by one and one-fourth inches by one and one-fourth inches to stir battery fluid into batteries, that he had been building batteries the afternoon before or the morning of the accident and had used this grade stake, and that he was carrying the grade stake on his car (T. 412, Exhibit G).

The plaintiff on the stand testified that: "I don't recall using a surveyor's grade stake" (T. 400). The plaintiff also denied remembering making the written statement in which he admitted using and carrying the grade stake, claiming that he was unconscious or mentally incompetent at all times when such statement was taken (T. 241, 400). For good measure, plaintiff also repudiated two other statements (T. 235-41; 243), admittedly signed by him (T. 397), given at other times to other persons, and which were corroborated on the witness stand under oath by such persons (T. 315-18; T. 279-282, 288).

ARGUMENT OF THE CASE

I.

In F.E.L.A. Cases There Still Must Be More Than a Scintilla of Evidence of Defendant's Negligence Before the Case May Be Properly Left to the Discretion of the Jury.

The United States Supreme Court has reaffirmed the proposition that under F.E.L.A. the employer is not the insurer of his employees, that the basis of liability has not been shifted from negligence to absolute liability and that the weight of the evidence under the Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact.

We have arrived at this conclusion from the language contained in *Wilkerson v. McCarthy,* 336 U.S. 53, 93 Law Ed. 497. Mr. Justice Black in this case states:

> "* * * The Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct since the Act imposes liability only for negligent injuries." (From page 61 U.S., 504 Law Ed.)

The same Justice Black in the earlier case of *Galloway v. U. S.,* 319 U.S. 372, 87 Law Ed. 1458, seemed to indicate that a directed verdict was a relatively modern invention and that any common law case in which a jury may be demanded should never be taken from the jury since the jury must be deemed as capable of finding a correct answer as the court. (See Judge Minton's decision on *Trust Company v. Erie R. Co.,* 165 Fed. 2nd, 806, at 810.) Subsequent to the *Galloway* decision, however, the United States Supreme Court conclusively demonstrated that on this point

Mr. Justice Black represented only a minority of three judges, Black, Douglas and Murphy, in this opinion, if in fact this was their opinion, and that in F.E.L.A. cases the plaintiff must still bear the burden of proof or suffer a directed verdict. In *Brady v. Railway,* 320 U.S. 476, 88 Law Ed. 239, the majority of the court, Black, Douglas, Murphy and Rutledge dissenting, specifically held that:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

This stand of the majority was further strengthened by the language of Mr. Justice Frankfurter concurring in the *Wilkerson Case, supra:*

> "The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge." (See page 65 U.S.; page 506 Law Ed.)

Judge Claude McColloch, who tried this case below, is a fully experienced trial judge and would never come under

the classification of a "timid judge" referred to above. Judge McColloch in this case assessed the plaintiff's evidence fully and accurately and found it wanting. The majority of the United States Supreme Court has indicated that his action in so doing, was legally proper.

In the *Wilkerson Case, supra;* Mr. Justice Douglas appends a list of cases showing that the United States Supreme Court in the past decade has in thirteen cases sustained the action of trial courts in taking plaintiff's case from the jury. The *Brady, Hunter* and *Eckenrode* cases listed were decided by a majority of the court in written opinions, (Black, Douglas and Murphy dissenting in each), and the other cases were memorandum opinions in which certiorari was denied.

More so perhaps than in other types of litigation, the law in F.E.L.A. cases arises out of the facts, and each case depends almost wholly on the facts shown therein. An excerpt from the *Brady* case is often quoted:

> "An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies." (Page 480 U.S.; page 243 Law Ed.)

Therefore, we proceed with this argument upon the basis that the employer is still not regarded as an insurer of his employees under the Act; that proof of negligence is still necessary to sustain a recovery under the Act; and that in a proper case a trial judge is still under a duty to direct a verdict when the evidence of defendant's negligence amounts to no more than " a scintilla", or where submission would involve "mischance of speculation over legally unfounded claims."

II.

No Inference of Negligence, or "Res Ipsa Loquitur," Arises When:

(a) The Actual Cause of the Accident Is Conclusively Shown; or

(b) When None of the Instrumentalities Involved in the Accident Are in Sole Control of Defendant as to Inspection and User.

(a) The doctrine of "*res ipsa loquitur*" has given rise to reams of judicial opinion and law writers' text. Judge McColloch, in the trial of this case, indicated that he did not favor the use of the term *res ipsa loquitur* since it tended to confuse what otherwise were simple issues. As appears from a summary of the evidence in this case, there can be no reasonable doubt concerning the cause of the accident here. A white pine stick approximately twenty-four inches long and an inch and a quarter square, one end of which was driven by the motor car into a railroad tie at a forty-five degree angle about four inches below the top of the tie, and the other end of which was wedged against the brakerod on the under-side of the motor car, caused the motor car to lift from the rails while it was running and derail,— the lifting action being very much like that seen when a pole vaulter, after a running start, places his vaulting pole at a forty-five degree angle in a trough under the crossbar to be cleared and lifts himself forward and upward off the ground to clear the bar.

The specific cause of the accident having been shown beyond any reasonable doubt, there was no reason for the doctrine of *res ipsa loquitur* to come into play (*Omaha Company v. Railroad,* 120 Fed. 2nd, 594; Cert. Den.; 314 U.S. 645; 86 Law Ed. 517; see annotation in 59 A.L.R. 468 and illustration at page 471). This was the attitude taken by the trial judge in this matter.

(b) If we must consider the doctrine, however, the most recent definition thereof in this court appears in *U. S. v. Johnson,* 181 Fed. 2nd 577, at 582, C.A.9. This court quotes from Mr. Wigmore as follows:

> "(1) The appartus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." (Wigmore on Evidence, Third Ed., Sec. 2509.)

The motor car used by plaintiff was a standard type motor car (T. 53-4, 139, 156) in very good condition (T. 130) which had been driven thousands of miles by the plaintiff and his predecessor (T. 139), and there is no evidence whatsoever in the case that this motor car was defective in any respect. We say this advisedly in the face of appellant's statement on Page 18 of the Opening Brief claiming in argument, although *not* shown by the facts, that the motor car was unstable and was of improper construction. What "proper construction" might be under the circumstances is nowhere shown, although the inference is that such motor car should be made so heavy (it did weigh 495 lbs.—T. 156) that the signalman using it could not lift it from the tracks,

and should be made so "bullet shaped" or "streamlined" that any object striking it would not find lodgement.

As to the first implied requirement, a motor car must be constructed light enough so as to be readily removable from the rails by the signalman using it so as to give free passage to freight and passenger trains on the tracks. As to the second implied requirement, there is no rule of law which requires the invention of types of equipment which will be impervious to any danger, however remote.

At page 17 of the Opening Brief, appellant, without citation to the Transcript, flatly states that the motor car "was furnished and maintained by defendant and respondent". It is true that the defendant railroad company furnished the signalman with the motor car. The evidence showed that plaintiff had complete control and supervision over the motor car in his use of it in patrolling his section of the transcontinental track (T. 55-8, 225, 292-3). It is, therefore, nowhere shown in the evidence that as to the motor car "both inspection and user" was in control of the defendant company and, in fact, the contrary appears, that both the inspection and control were in the plaintiff signalman.

This leaves the tracks, rails and roadbed as the "apparatus" which must be, as to "inspection and user", in the control of the defendant. First of all, it was not any defect in either the tracks, rails or roadbed which caused the derailment here. It was the white pine (T. 108) two-foot stick (T. 326-331; 356-360; Photographs C-1, C-2, J, K, L, D-1 to 4) which acted as a lever for a fraction of a second, raising the motor car (T. 116) more than the inch and a quarter necessary to free the wheel flanges from the rails (T. 52,

364). When the motor car, after its momentary vaulting, came down again, it came down north of the rails and, after running along the ties for some distance, it left the track (T. 86, 155, 328, 338).

The condition of the tracks, rails and roadbed was as much under the control of the plaintiff as it was of the defendant. The plaintiff in his patrolling of the tracks as signalman was at all times under duty to watch for obstructions in the track or to keep a "clear track" (T. 69, 228). His testimony showed that *twice immediately prior to the accident* he had passed over the place where the accident occured (T. 59, 64-5). His eyesight was normal, 20-20 (T. 73), and there was nothing to distract his attention (T. 67-9).

It is further common knowledge that the transcontinental main tracks of the railroad are not an exclusive highway for railroad cars and traffic alone. Pedestrians and hoboes use the tracks freely to go across country, and train passengers and casual passengers on freight cars throw objects on tracks and road beds without second thought. The only duty which the defendant bears to its tracks, rails and roadbed is the duty of reasonable inspection and maintenance, which will be covered in the subdivision following.

The appellant cites *Jesionowski v. Railroad,* 329 U.S. 452, 91 Law Ed. 416, as authority for his position that the derailment of the motor car *of itself* was sufficient in this case to raise some inference of negligence on the part of defendant. It would appear, in fact, that plaintiff's whole case was prepared and tried with the Jesionowski case in mind. A reading of that case, however, shows that there was involved in the accident a "frog" operated by a spring

mechanism, and that if the spring failed to work when the car wheels passed over it, the cars might be derailed. Some other evidence tended to show that at the time the derailment occurred splinters and planks were thrown into the air near the "frog". (See page 455 U.S.; page 420 Law Ed.) The injured employee had no control whatsoever over this "frog", and the defendant railroad *did have exclusive control over the "frog"* as well as over the operation of the train involved in the accident:

> "* * * to infer that either the negligent operation of the train or the negligent maintenance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad had exclusive control of both." (See page 458 U.S., page 421 Law Ed.)

In that case, it once having been established by the jury that the railroad employee was free from negligence in handling the only instrumentality over which he had some control—the switch—then the court properly held that, there being some evidence that other factors *in the exclusive control of the defendant* had something to do with the accident, the jury could infer negligence on the part of the defendant.

That the Jesionowski case did not overturn the long established test announced by Judge Pope of this court in the *Johnson* case above, is made clear in *Johnson v. U. S.*, 333 U.S. 46, 92 Law Ed. 468. That appeal arose out of a decision under the Jones Act, which makes applicable to such suits the standard of liability of F.E.L.A. The testimony of the plaintiff there, if it were accepted as true, showed that *he had no control* over the apparatus which caused his injury. When he was hit by a block dropped from

the deck above him, he was bending over coiling a line. The court said:

> "We need not determine what the result would be *if it were shown that petitioner was pulling on the rope when the accident happened.* For the uncontradicted evidence is that he was not pulling on the rope, but was bending over coiling it on the deck. But where, as here, *the injured man is not implicated,* the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. In short, Dudder (defendant's other employee) *alone remains implicated,* since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible." (Page 48 U.S., page 472 Law Ed.)

In the present case, the plaintiff had control and inspection of the motor car; he had control and inspection of the tools and apparatus which he kept on the motor car and had full control and operation of the motor car. Plaintiff, under the requirement of his duties, was responsible for inspection of the tracks over which he rode. There was nothing concerned in the accident over which the defendant itself, through its other employees, had *sole* "inspection and user".

This court has had occasion to consider both of the above cases in its recent decision of *The Rocona v. Company,* 173 Fed. 2nd 661. This court said in the Rocona decision what we have said above:

> "(In the Jesionowski case) it was proper to apply the rule of res ipsa loquitur on the assumption that the railroad had *exclusive* control of the remaining probable causitive instrumentalities."

In the *Rocona* case, the defendant had exclusive control of the tugboat which was apparently the only other instrumentality which could have caused the accident. This court properly held that, despite the testimony of the tugboat operators, the evidence was sufficient to support a reasonable inference of negligence on the part of the tugboat operators.

In the present case, the main line transcontinental track upon which the accident happened had been thoroughly inspected not only by the plaintiff himself but also by other employees of the railroad on the morning of the accident (T. 162-3, 169, 170, 174, 186-189, 191-2, 323, 337). The plaintiff in his motor car had passed over the place of the accident *twice within the hour* before the accident (T. 59, 64-5), and an inspection car on which the assistant division engineer and the signal supervisor were riding and making their regular track inspection also had passed over the same spot once in the morning and again within the hour before the accident (T. 191). There was no evidence whatsoever that the white pine stick which caused the accident had remained upon the track for any length of time so that the railroad might in the exercise of due care have discovered it, or that the stick was in a position to cause the derailment for any length of time before the accident happened. Appellant refers to some testimony that the stick was weathered and had oil on it (page 19, Opening Brief), but the reference at the pages of the transcript indicated show that the stick had only oil on it (T. 91). This was later explained by the testimony that the stick had come into contact with the under side of the motor car where there was oil and grease (T. 357). There is no evidence that the

stick was "weathered", the reference by appellant to page 151 of the transcript being wholly unproductive of any evidence on the point. If the stick was "weathered", there is no evidence or reasonable inference therefrom that it became "weathered" by remaining at the place of the accident—it might have been "weathered" in Oregon after it was cut from its white pine tree,—or at some later storage yard.

In making legal research to discover appellate decisions which might involve facts similar to those here, no federal case was found, but a decision in the Supreme Court of Massachusetts, *Lynch v. Railroad,* 200 N.E. 877, involves facts very similar to those found here. In that appeal, a judgment for the defendant, notwithstanding the verdict, was sustained. The employee was killed when a motor car was derailed and, assuming that the testimony of his co-employees who were on the motor car with him was true, no cause for the accident appeared since these employees denied that anything had fallen off the motor car which might cause the derailment. The plantiff depended upon the doctrine of "res ipsa loquitur", but the Supreme Court held specifically that the doctrine did not apply. There was evidence of: (1) bent bar found at the scene of the accident; (2) of a small gouge in the top and side of a tie at the place of derailment; and (3) marks on the ties. The bent bar was similar to one carried by the decedent in the motor car. There was no evidence of any previous trouble with the motor car, no evidence of any defects in it and no evidence of improper inspection. The Massachusetts Supreme Court held that there was no case for jury decision.

Another state court case from New Hampshire, *Dade v. Boston Railroad,* 30 Atl. 2nd, 485, involved the death of an

employee in the derailment of a motor car. There was some evidence that stones had dropped from trucks loaded with gravel crossing the tracks. There was further evidence that an employee of the company was seen picking small stones off the track. The court, however, held that the most the evidence showed was a *possibility* that the accident may have been due to such a cause and that such possibility depended wholly upon conjecture and could not be submitted to a jury.

A third state court case somewhat similar is *Wallar v. Terminal Company,* 166 Pac. 2nd 488 (Oregon), Cert. Den., 329 U.S. 742, 91 Law. Ed. 640. This was one of the cases cited by Justice Douglas in his appendix to the Wilkerson case above. The plaintiff testified that he lost his footing while trying to step on a boxcar in the railroad yards. He charged the railroad with negligence in: 1) permitting the footpath which he used to become muddy and sleek, and 2) permitting debris and wooden sticks to remain along the ground. Plaintiff's testimony was that he stepped on a stick and that it rolled with him. He further said that he had seen sticks down in yards the day before and had seen some that night. There was testimony that defendant had crews picking up debris in the yards and that it was the duty of these crews to keep the yard clean. The court held that there was not a scintilla of evidence how long the stick, if there was one, had been there (Page 497). The court further held that the fact that an accident occurred constituted no evidence of negligence on the part of defendant in view of the use of the yard by others for whom the defendant was not responsible. (Page 498) The court concludes by saying:

"The rule is firmly established that where plaintiff slips upon an object on the premises of defendant the plaintiff must, in order to show liability, show that the defendant or his agent put the dangerous object there or that they knew, or by the exercise of reasonable diligence could have known, that it was there and failed to exercise diligence to remove it." (Page 498)

Appellee submits on this phase of the case that the doctrine of *res ipsa loquitur* has no application to the facts developed in the evidence.

III.

When a Derailment Is Caused by a "Foreign Object" on the Tracks, Defendant's Negligence Must Consist Either:

(a) Of Leaving the Object in a Dangerous Position on the Tracks; or

(b) In Knowing, or by Exercise of Reasonable Diligence Being Able to Know, of the Dangerous Condition, and Failing to Exercise Diligence to Remove It.

The test applied by Judge McColloch, when ruling on the motion for directed verdict, appeared to be that set forth in the *Wallar* case above. *Accord: Matthews v. So. Pacific Co.,* 15 Cal. App. 2d 36, 59 Pac. 2d 220; *Spencer v. A. T. & S. F. Ry. Co.,* 92 Cal. App. 2d 490, 207 Pac. 2d 126.

The Safety Appliance phase of the case (under which liability for "safe equipment" under certain stated circumstances is absolute) having been dismissed with consent of plaintiff (T. 408), the only issue concerning the furnishing of a "safe place" for plaintiff to work was one of simple negligence. As to furnishing such a "safe place", the defendant was not an insurer but only " 'liable for injuries attributable to conditions under its control when they are

not such as a reasonable man ought to maintain in the circumstances', bearing in mind that 'the standard of care must be commensurate to the dangers of the business' ". (Mr. Justice Black at page 61, U.S.; page 504 Law Ed. in the Wilkerson case, supra.) Defendant's obligation was not such as to impose liability regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act. *(Wolfe v. Henwood,* 162 Fed. 2nd 998, (CCA 3), Cert. Den.; 332 U.S. 773, 92 Law Ed. 357; *Lasanga v. McCarthy,* 177 Pac. 2nd 734 (Utah), Cert. Den.; 332 U.S. 829, 92 Law. Ed. 403; *Beamer v. R. R.,* 26 S.E. 2nd 43 (Va.), Cert. Den.; 321 U.S. 763, 88 Law Ed. 1060.

It was conclusively established by the evidence that the accident had been caused by the white pine wooden stick wedging itself between the under side of the motor car and the side of the railroad tie in such as way as by leverage, in the fraction of second before it broke, to raise the car a distance sufficient to free the car wheel flanges from the rails and cause the car to plunge forward off the rails onto the track. This being shown, it then became necessary for the plaintiff to show either: (A) That the defendant railroad or its agents had placed this stake on the tracks in such manner that it was dangerous to passing motor cars; or (B) That the defendant or its agents knew, or by the exercise of reasonable diligence could have known, that the stake was there in a dangerous position—and failed to exercise diligence to remove it. (See also *Matthews v. So. Pac.,* 45 Cal. App. 2d 36, 59 Pac. 2nd 220; *Spencer v. A. T. & S. F. Ry. Co.,* 92 Cal. App. 2d 490, 207 Pac. 2d 126). These two theories will be discussed separately.

(A) DID THE DEFENDANT COMPANY, THROUGH ITS AGENTS, LEAVE THE PINE STICK IN A POSITION ON ITS MAIN TRACK DANGEROUS TO PASSING MOTOR CARS?

The only evidence connecting the "white pine" stick (T. 108, 356, Photo C-2) with the defendant railroad was testimony that the stick resembled a "grade stake" (T. 89, 110) or a "surveyor's stake" (T. 142) similar to those used by railroad survey crews (T. 171, 175, 192). The stake had no survey marks on it (T. 91). There was evidence that no railroad survey crews were in the vicinity of the accident (T. 343, 196). Section crews had been seen somewhere between Bowie and Willcox (T. 196-7), a distance of twenty-four miles on the map, but no surveyors (T. 343). The plaintiff had operated his motor car over the place of the accident *twice* that day, before the accident occurred, and had seen no survey parties. The assistant division engineer and signal supervisor had also operated their motor car over the place of the accident, once in the morning and again shortly before the accident, proceeding for many miles in both directions, and they too had seen no survey parties (T. 196, 343). Yet if the stake had been left by a survey party in the position in which plaintiff urges it must have been at the time the accident occurred—that is, firmly imbedded about four inches below the top of the railroad tie in the side of the tie (T. 115, 325, 327, 329-331, 340, 369, Photo C 4-5), protruding upwards at an angle of forty-five degrees for fifteen to sixteen inches above the rails (T. 365) in a westerly direction (T. 350-2), the direction from which the plaintiff was to come in his motor car—then it follows the stake must have been driven by surveyors into the side of the tie within the short interval from the time the plaintiff left the signal, returned to Willcox—over the

place of the later accident—to get the missing parts, and the happening of the accident on his return from Willcox (T. 64-5, 68), otherwise plaintiff would have seen it, or hit t in one or the other of his two trips over the same spot. Using the overall mileage given as being about four miles (T. 59, 163, 403) and the speed at which plaintiff traveled as being about seventeen miles per hour (T. 68), and allowing ample time for the plaintiff to get his equipment in Willcox, there could only have been at most a half hour between the time the plaintiff passed over the accident scene, westbound, and the time of the accident itself. In that interval the jury, without any factual basis, would have to find that an up-to-that-point unseen surveyor hammered the white pine stick into the side of a treated railroad tie (T. 340-1) at a forty-five degree angle, thrusting more than fifteen inches into the air above the rails (T. 365), for purposes which no one could conceive, and that the phantom then left, surreptitiously and secretly, never to be seen again.

The above is, of course, wholly conjecture and speculation. It is wholly speculative in the first place to conjecture that the wooden stick had been used at any time by the defendant's surveyors, or, if it had been so used, that it came to the scene of the accident through any act on the part of defendant's surveyors or defendant's employees. It is entirely possible that the stake had been part of a bundle of sticks gathered by some wandering tramp or hobo to make himself an evening fire, and that he had dropped the stick in his weary walk into Willcox. It is equally possible that a passerby might have thrown the stick onto the railroad track or that it had been dropped there by some passenger on a train or on a freight.

Then it is wholly conjecture and speculation that the stick was left by defendant's hypothetical surveyor or other employee in any position in which it could cause the accident which occurred. The testimony is that surveyors' stakes had been seen lying on the roadbed adjacent to the track (T. 172, 192, 344) and that occasionally surveyors' stakes were seen driven into the ballast between the rails (T. 175) protruding not more than a few inches above the ballast and *below* the rails (T. 175). If the stake was lying between the rails, what force was it which made it suddenly stand up at a forty-five degree angle in such manner as to plunge one of its ends into the railroad tie and the other into the under side of the motor car? Did this stake, like the rope in the fabulous Indian rope trick, have the power of levitation? The hole driven by the stake into the tie was fully fifteen inches from the nearest rail (T. 352, 327, 115). By what mental processes could the reasonable juryman arrive at the conclusion that the stake was actually or potentially a dangerous instrumentality, known to be such by the railroad's employees, or placed in such position on the track by the railroad's employees, so that it became a dangerous instrumentality? As said in the *Dade* case above, this conclusion would have to depend "wholly on conjecture". Under these circumstances, the trial judge properly withdrew the case from jury consideration. *(Eckenrode v. R. R.,* 164 Fed. 2nd 996, affirmed in 335 U.S. 329, 93 Law Ed. 41; *Trust Co. v. R. R.,* 165 Fed. 2nd 806 (C.C.A. 7), Cert. Den., 334 U.S. 845, 92 Law Ed. 1769; *Cowdrick v. R. R.,* 39 Atl. 2nd 98 (New Jersey), Cert. Den., 323 U.S. 799, 89 Law Ed. 637.

B) DID THE DEFENDANT, THROUGH ITS EMPLOYEES, KNOW OR BY THE EXERCISE OF REASONABLE DILIGENCE COULD IT HAVE KNOWN THAT A DANGEROUS CONDITION EXISTED, AND THEN DID IT FAIL TO EXERCISE DILIGENCE TO REMOVE IT?

What can be said on this point is largely a repetition of what has been said before. If plaintiff's theory is to be followed, it must be assumed that a two-foot stick, one and one-half inches square, lying inert between the railroad tracks, or pounded into the ballast so as to protude not more than a few inches above the ballast and *below* the railroad rails (T. 175) creates a dangerous condition which was known, or should have been known, to the defendant railroad. Again we repeat that the plaintiff himself drove his motor car over the place of the accident *twice within the hour before the accident;* that his vision was 20-20, which is excellent (T. 73); that his duties required him to look for objects on the track, and that he did not see any. If the stick had been in a "dangerous" position on either of those occasions, the accident would have happened *then* and not the third time the motor car passed over the same spot.

The testimony further shows that the regular inspection made by the assistant division engineer and the signal supervisor in the morning of the accident and again shortly before the accident did not reveal any dangerous condition or any object on the track. (T. 170, 186, 189, 191, 323) And this despite the fact that the appellant lays some stress on the fact that these employees failed to discover a brakehanger which was on the road bed some one hundred feet distant from the scene of the accident (T. 114, 155-5). The photographs clearly show that the brakehanger was by no stretch of the imagination a "dangerous" obstacle or a

potential danger of any sort to passing traffic, and that therefore the plaintiff himself and the other railroad employees were under no duty to take any action regarding such hanger (which of course had nothing to do with the accident itself, being more than seventy ties from the place of derailment) (T. 114, 142).

The evidence, therefore, wholly failed to show expressly, or *by any reasonable inference,* that defendant had been negligent under either test set forth above.

IV.

Plaintiff's Testimony Is Not Sufficient to Carry Issue of Railroad's Negligence to the Jury When It Is so Opposed to Known Facts and Reasonable Inferences Therefrom That Jury Could Not Fairly Reconcile It with Such Established Facts.

The foregoing argument must leave a question in the court's mind, as it did in the trial court's mind, that since the accident *did* happen, and since the white pine stick undoubtedly caused the accident, where did the stick come from?

The railroad's hypothesis or reconstruction of the facts showed that the plaintiff signalman in the course of his duties was engaged in the rebuilding of storage batteries used to maintain signals along the main line of the railroad (T. 120, 130, 219-223, 228). Plaintiff was extremely busy for the week before the accident rebuilding storage batteries at points along the main track (T. 224). The batteries were glass jars, 14 inches deep by 4 x 5½ inches wide, which were filled with water (T. 149, 198) to a certain level (T. 149). Cubes of caustic soda were placed in the water and dissolved *by stirring* (T. 149, 220-1). In stirring the caustic soda into the water, it was obvious that metal could not be

used, and therefore signalmen used *wooden sticks,* usually thin pieces of wood whittled out of orange crate slats (T. 149-50, 221). The wooden stick which caused the accident was a proper length (T. 198, 90, 143) to be used in stirring a battery solution and was stained for twelve inches "all around" (T. 198), showing it had been used in stirring caustic soda to a depth of twelve inches (T. 143, 149-151, 154).

The statement given by the plaintiff shortly after the accident (Exhibit G, T. 408-413), taken by the company investigator (T. 245-253) with the permission of plaintiff's doctor (T. 260, 306) and in the presence of the registered nurse who testified that the plaintiff was mentally competent to make the statement (T. 297, 303-5), admitted that the plaintiff had used a grade or surveyor's stake, one and one-fourth inches square and two and one-fourth feet long (T. 412), in building batteries during the very busy week preceding the accident, and that he had carried this stake on his motor car (T. 412). It therefore seemed very clear to the engineers reconstructing the accident that the stick which caused the accident was the stake used by the plaintiff in building batteries and carried by the plaintiff on his motor car (T. 351, 355-359, Photographs C-1, C-2, D-1-4).

As shown by the photographs and by the plaintiff's testimony, the plaintiff had a safe place on his motor car to carry tools and equipment in the form of a trough, with a partition some nine inches high at the front end thereof (Photos D 1-4, T. 412). Plaintiff testified that he was driving his motor car in a forward direction (T. 59). Therefore, there seem to be only two possible conclusions to be drawn from the evidence.

One conclusion is that the plaintiff had balanced the stake somewhere on his motor car in such position that it worked forward and fell from the front end of the motor car, flipping over and over to bury its sharp point in the side of the tie and to come up under the car with the other end *between* the angle iron and the brake rod. (The angle iron is in front of the brake rod and hangs down *an inch and a quarter lower* than the rod (T. 363-4, Photo D-4). The forward drive of the motor car forced the point into the tie and wedged the blunt end into the undercarriage at a forty-five degree angle so as to cause the vaulting movement and "sudden jolt from the bottom" noted by the plaintiff in his testimony (T. 69-70).

The only other conclusion which seems reasonably possible is that the plaintiff used the stake in such manner that it became somehow wedged in the undercarriage of the motor car and that the pointed end kept dropping lower and lower as the car went over the rails until it finally buried its point into the side of the railroad tie at the forty-five degree angle shown.

The ingenuity of the human mind might discover other possible ways in which this grade stake took the position of a pole-vaulter's pole and, in the fraction of a second before it broke, lifted the motor car the few short inches necessary to untrack the car.

If, as the plaintiff testified at the trial, he did not "recall using a surveyor's grade stake" (T. 400) to build batteries (Plaintiff was so evasive on some points in his testimony (T. 222) that Judge McColloch had to advise him: "Will you answer the gentleman?" (T. 233).) and did not carry a grade stake on his motor car at any time nor any

piece of wood on his car that day or probably for days before (T. 401-2), then there *just is no reasonable explanation* of how the accident happened. The appellant may urge the doctrine of *res ipsa loquitur* as strenuously as he cares, and may contrive speculative inferences connecting "surveyors' stakes" and "railroad surveyors", and urge "failure to inspect" and all the other arguments that a stimulated ingenuity can devise, but the physical facts do not lead to any reasonable conclusion other than the inescapable conclusion that the stick which caused the accident was a stick which the plaintiff had been using to stir caustic soda into the batteries which he had been building; that this stick alone caused the accident, and that no negligence whatsoever on the part of the defendant in this connection was shown.

On this point, we refer the court to the rule that if the plaintiff's evidence is contradictory to the known facts and all reasonable inferences arising therefrom, then there is no case for a jury. *(Redman v. R. R.,* 70 Fed. 2nd 635, 637, modified on other grounds; 295 U.S. 654, 79 Law Ed. 1636; *Pa. Ry. v. Chamberlain,* 288 U.S. 333, 77 Law Ed. 819; *Scoccozza v. R. R.,* 171 Fed. 2nd 745; Cert. Den. 337 U. S. 907, 93 Law Ed. 1719.)

CONCLUSION

Appellee respectfully submits that Judge McCulloch's decision directing a verdict on behalf of defendant at the close of all the evidence on the issue of liability should be sustained.

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